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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL KEITH GREGORY, Defendant and Appellant.	C043740 (Super. Ct. No. 02CR1474)

A jury convicted Michael Keith Gregory of possession of an illegal substance in Mule Creek State Prison (Pen. Code, § 4573.6.)[1] After he admitted three prior felony convictions, he was sentenced to an aggregate state prison term of nine years.

Gregory appeals, contending that (1) the trial court prejudicially erred in refusing to allow his counsel to ask a question pertaining to prison guards framing other inmates, (2) the court erred in failing to conduct an inquiry into the potential "negative attitude" of a juror, and (3) he was

[1] Undesignated statutory references are to the Penal Code.

improperly sentenced. We shall correct the sentencing mistake, but otherwise find no error and affirm.

FACTUAL BACKGROUND

In the afternoon of November 6, 2001, Sergeants Kenneth Franklin and Kevin Rutherford, officers with the Investigative Services Unit (ISU) of the California Department of Corrections, were conducting a random routine search at Mule Creek State Prison (Mule Creek).

Sergeants Franklin, Rutherford and two other officers entered the day room of Building 9, where Gregory was seated at a table with two other inmates. As soon as Gregory saw Franklin, he turned back around and put his right hand in his front pant's pocket. Franklin yelled out Gregory's name and ordered him to take his hand out of his pocket. Gregory at first ignored the command, then got up and started walking away from Franklin. Franklin advanced and cut off Gregory's egress. Gregory still had his hand in his pocket, and Franklin again ordered him to remove it. Gregory at first ignored him, then when Franklin drew closer, responded, "Why?" As Franklin was about to grab him, Gregory drew his hand out of his pocket and threw two bindles of tar heroin against the wall. Franklin seized Gregory, pushed him up against the wall and called Rutherford for backup assistance.

Sergeant Rutherford arrived on the scene and Sergeant Franklin directed him to the bindles. Rutherford picked up the bindles and the two officers conducted a pat-down search of

Gregory. They recovered cards and poker chips from Gregory's pockets. Noticing that he smelled of alcohol, the officers directed Gregory to provide a urine sample, which would also have revealed heroin use. He refused.

Inmate Michael Hansen, a one-time cellmate of Gregory's, testified that Gregory told him about the incident. He admitted to Hansen throwing away two bindles of heroin before being apprehended by Sergeant Franklin, because he did not want to get caught. Gregory disclosed that he had been drinking "pruno," an inmate-manufactured intoxicant on the day in question, and that he refused a urinalysis test because he knew it would come up positive for heroin.

Defense

Inmate Gary Cooper testified that Gregory was wearing white shorts without pockets on the day that Sergeants Franklin and Rutherford seized Gregory. He also did not recall seeing Gregory throw anything against the wall or an officer pick up anything off the floor. Cooper also stated that the prison guards at Mule Creek commonly "set up" inmates.

Gregory, testifying on his own behalf, stated that he was wearing pocketless white shorts when the guards came into his unit for a random search. As he was getting up for a drink of water, he saw Sergeant Franklin rapidly approaching him. Franklin was flailing his arms and saying something Gregory could not understand, most likely because of a hearing problem he has in his left ear. Franklin forced him against the wall

and held his forearm against his throat. Gregory refused to take the urinalysis test because he thought it was enough that he admitted to being intoxicated. He denied possessing heroin or telling Hansen that he had thrown down two bindles of heroin before Franklin reached him. Gregory claimed that correctional staff had mistreated him ever since he filed a declaration against one of his supervisors in July 2001.

DISCUSSION

I. Exclusion of Evidence

Inmate Cooper testified for the defense that correctional officers at Mule Creek try to "set people up" all the time. When asked what "set up" meant, Cooper stated, "Well, dropping -- blaming it on somebody else or having an inmate set up other inmates." Over the prosecutor's objection, Cooper added that he had personal knowledge of this happening and that it "could be" a common occurrence.

Inmate George Narvarez testified that Gregory was wearing white shorts in the day room on November 6. Shortly thereafter, Defense Counsel George Wright asked, "Do you have any personal knowledge of inmates being set up by [ISU]?" which precipitated the following exchange:

"[THE PROSECUTOR]: Objection, relevance.

"THE COURT: Sustained.

"[DEFENSE COUNSEL]: Relevant, this is the whole case. The case is based on --

"THE COURT: Sustained. You may rephrase. Be specific as to this case.

"[DEFENSE COUNSEL]: I have nothing further."

Based on this brief exchange, Gregory seeks reversal of the judgment, claiming the trial court cut off crucial potential evidence that ISU officers in Sergeant Franklin's unit have framed other inmates by planting contraband. He argues that such occurrences would be relevant to a "third party culpability" defense. We do not reach this issue, for it is clearly waived.

In order to preserve an evidentiary point for appellate review, the proponent of the evidence must make an offer of proof regarding the anticipated testimony. (See *People v. Whitt* (1990) 51 Cal.3d 620, 648; Evid. Code, § 354, subd. (a).) Such an offer must be specific, setting forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) "Failure to make an adequate offer of proof *precludes consideration of the alleged error on appeal*." (*People v. Eid* (1994) 31 Cal.App.4th 114, 126, citing *Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 758, italics added.) Gregory has utterly failed to satisfy this prerequisite.

When the trial court sustained a relevancy objection to the question, counsel quickly withdrew from his line of questioning. He did not ask for a hearing on the issue, nor did he attempt to state an offer of proof as to the substance of the testimony he

proposed to elicit from Narvarez. Absent an offer of proof, this court cannot possibly know the nature of the testimony excluded. More importantly, defense counsel's omission prevents us from performing our constitutional duty to determine whether the evidentiary ruling complained of was prejudicial. (Cal. Const., art. VI, § 13.) Thus, the argument is not cognizable on appeal. (Evid. Code, § 354, subd. (a).)[2]

Although unnecessary to our decision, we also note that the defense had already presented testimony from inmate Cooper that the correctional officers at Mule Creek "set up" inmates "all the time." From all we can glean from the record, defense counsel's question merely sought to elicit the same general answer, and was thus cumulative.

Gregory suggests that if his defense counsel was "negligent" in failing to make a "more detailed offer of proof," this court must consider whether he received ineffective assistance of counsel. However, because we have no way of ascertaining what sort of evidence was potentially excluded, ineffective assistance cannot be shown on this record. It is entirely plausible that Attorney Wright quickly withdrew from his line of questioning because he had no evidence of specific incidents of misconduct by ISU officers. Where the appellate

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[2] The importance of satisfying this prerequisite is illustrated in the primary authority cited by Gregory himself, *People v. Minifie* (1996) 13 Cal.4th 1055, in which defense counsel, when confronted with an adverse evidentiary ruling, made an elaborate offer of proof. (*Id.* at pp. 1061-1062.)

record does not reveal whether counsel had a legitimate reason for his litigation choice, any ineffective assistance claim must be pursued by way of petition for writ of habeas corpus. (*People v. Snow* (2003) 30 Cal.4th 43, 95.)

II. Failing to Question Juror About "Negative" Demeanor

On the third day of trial, the clerk's minutes reflect that Attorney Wright complained that Juror No. 12 was not paying attention. Judge Carol Koppel promised to keep an eye on the juror. Later that morning, counsel raised the subject on the record, stating: "Juror No. 12 was looking like he doesn't want to be here. I've been watching him yesterday. He looked like he's fully frustrated." Wright reminded the judge that she had forgotten to observe the juror in response to his prior complaint and again voiced his concern. Judge Koppel responded, "Okay, we'll deal with it hopefully before lunch."

Just before the case went to the jury, Attorney Wright requested that the court address "the matter of Juror No. 12." The judge replied that she had watched the juror intently for about 20 minutes, and "I am sorry to say that I did not see anything, any kind of facial expressions on his face that were any different then [*sic*] the facial expressions on the other two sitting next to him. There were certain kinds of expressions certainly granted that, but I think very difficult to not expect the jurors to react somewhat to the testimony that has been given here."

Counsel voiced his disagreement, telling the judge that he was not complaining about Juror No. 12's reactions to testimony, but "[it] seemed like . . . from his demeanor, from his attitude, looked like he didn't want to be here. I said that two days ago." The judge responded, "Well, I didn't see it counsel. So I'm not going to question him separately."

Gregory now contends that the trial court failed in its obligation to conduct an inquiry into whether Juror No. 12 was properly performing his duty to render a fair and impartial verdict. We disagree.

Section 1089, fifth paragraph, provides, in part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged" and replaced with an alternate.

The California Supreme Court has stated: "The decision whether to investigate the possibility of juror bias, incompetence, or misconduct -- like the ultimate decision to retain or discharge a juror -- rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform

his duties and would justify his removal from the case." (*People v. Ray* (1996) 13 Cal.4th 313, 343; accord, *People v. Osband* (1996) 13 Cal.4th 622, 675-676.)

In the case at bar, defense counsel insisted he saw expressions indicating Juror No. 12 did not want to be present. The trial court, after observing the juror intently, saw nothing of the sort. Because the trial court was entitled to rely on its own observations rather than the self-serving statements of counsel (see *People v. Fairbank* (1997) 16 Cal.4th 1223, 1253-1254; *People v. Clark* (1992) 3 Cal.4th 41, 107-108), no abuse of discretion is shown.

Even if the court had accepted defense counsel's observations as true, it did not err in failing to conduct a hearing. A juror's display of inattention or discomfort at having to sit through the proceedings is not uncommon in a criminal trial. Many people are not thrilled at the prospect of compelled jury service. The law does not require them to sit riveted and sphinx-like throughout the proceedings. Attorney Gregory's assertion that Juror No. 12's body language cast doubt on his ability to perform his sworn duties is unsupported and speculative. The trial court did not err in refusing to conduct an inquiry. (See *People v. Williams* (1997) 16 Cal.4th 153, 231-232; *People v. Bradford* (1997) 15 Cal.4th 1229, 1348-1349.)

III. Sentencing Error

Gregory received an eight-year sentence on the possession of heroin count (§ 4573.6), consisting of a four-year upper

term, doubled on account of a prior strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The trial court imposed an additional consecutive one-year enhancement on account of Gregory's prior felony conviction (§ 667.5, subd. (b)), for a total state prison term in this case of nine years.

At the time of sentencing, Gregory was also serving a two-year eight-month prison term for a 1997 conviction of possessing a weapon in prison (§ 4502, subd. (b) [hereafter section 4502(b)]). That term was arrived at by selecting the low term and doubling it because of a prior strike (§ 667, subd. (e)(1)).

In pronouncing sentence, the trial court ordered the current nine-year term to run "subsequent to and in succession to and consecutive to his present [1997] term." The court was apparently attempting to apply section 1170.1, subdivision (c) (hereafter section 1170.1(c)), which provides that a consecutive term for a new crime committed by a defendant while serving time for other offenses, shall commence at the time he would otherwise have been released from prison.[3] As ordered, Gregory's aggregate sentence on both cases totals 11 years eight months.

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[3] Section 1170.1(c) provides: "In the case of any person convicted of one or more felonies committed while the person is confined in a state prison . . . and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. *If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a). This subdivision*

However, Gregory contends the trial court neglected to apply the italicized portion of section 1170.1(c) quoted in footnote 3, *ante*. It requires that an incarcerated defendant receive a single, recalculated aggregate sentence for all his offenses in accordance with the standard formula (§ 1170.1, subd. (a)) for determinate sentence offenders.[4] Application of this formula means that the nine-year sentence in the current case became the principal term and the 32-month sentence for the 1997 conviction a subordinate term. Since, under section 1170.1, subdivision (a), a consecutive subordinate term generally consists of one-third of the middle term for any given offense (see *People v. Felix* (2000) 22 Cal.4th 651, 655), Gregory reasons that the term for his 1997 conviction should have been reduced from 32 months to eight months.[5] The People concede that a reduction is necessary, but point out that the subordinate eight-month term must be doubled to 16 months as a second strike, as was the case with the prior sentence. The People are correct.

As this court held in *People v. Riggs* (2001) 86 Cal.App.4th 1126, the proper procedure in sentencing a second strike

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shall be applicable in cases of convictions of more than one offense in the same or different proceedings." (Italics added.)

[4] Section 1170.1(c)'s single sentence formula applies where, as here, consecutive terms are imposed for multiple in-prison offenses. (*People v. Venegas* (1994) 25 Cal.App.4th 1731, 1743.)

[5] The middle term for a violation of section 4502(b) is two years. One-third of that term is eight months.

defendant who is convicted of felonies in separate proceedings, is to designate the principal term, calculate the subordinate terms as required by section 1170.1(c), and do*uble each of the resulting terms*. (*Id*. at pp. 1129-1131.) Thus, Gregory's subordinate 1997 term should be doubled and the total aggregate sentence should be 10 years four months, not nine years eight months, as Gregory proposes.

DISPOSITION

The judgment is modified to reflect that the nine-year sentence imposed in the present case shall run consecutively to a subordinate 16-month term for defendant's section 4502(b) conviction suffered in 1997. The total aggregate sentence shall be 10 years four months. So modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect this modification, and to forward a certified copy of the amended abstract to the Department of Corrections.

BUTZ, J.

We concur:

SCOTLAND, P. J.

HULL, J.